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CASE NUMBER _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

RONALD S. LEVENTHAL
As successor to
PROVIDENCE CONSTRUCTION COMPANY,

PETITIONER,

VS.

DAVE BAUER,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS
FOR THE STATE OF GEORGIA
CASE NUMBER A-97-A 1630

PETITION FOR WRIT OF CERTIORARI

RONALD S. LEVENTHAL
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October 26, 1998

57 pp

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_____

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RONALD S. LEVENTHAL
As successor to
PROVIDENCE CONSTRUCTION COMPANY,

PETITIONER,

VS.

DAVE BAUER,

RESPONDENT.

COMES NOW, the Petitioner, Ronald S. Leventhal, as successor in interest to Providence Construction Company and pursuant to Supreme Court Rule 10(b) and files this Petition seeking this Court vacate the decision of the Court of Appeals of Georgia, Case Number A-97-1630 (1997) by the issuance of a Writ of Certiorari from this honorable Supreme Court of the United States.

QUESTIONS(S) PRESENTED

Whether a later enacted statute applied retroactively, Section 11.1 of the Georgia Civil Practice Act [Official Code of Ga. Ann. § 9-11-11.1], known as the "anti-SLAPP" statute of Georgia, violates Article I, Section 10 of the United States Constitution, the Contract Clause, by impairing a pre-existing covenant, by permitting a party to oppose a rezoning when that party previously agreed through a contract (the "CONTRACT") not to oppose such rezoning.

--Whether PETITIONER, a developer, has a legitimate interest in securing, from a prospective contiguous property owner, to whom he is selling a portion of a tract of property, RESPONDENT, assurances by and through the CONTRACT (non-discriminatory restrictive covenants of public record) that such purchaser will not oppose certain planned single family, residential rezoning efforts on the contiguous tract by the developer.

--Whether the State of Georgia has a compelling, or even legitimate, interest in preventing PETITIONER, through the arms-length CONTRACT, from securing such an agreement from RESPONDENT and prohibiting RESPONDENT-purchaser from entering into the arms-length CONTRACT as a matter of personal choice whereby each obtains the benefits desired resulting from the purchase and sale.

--Whether the State of Georgia has prevented PETITIONER from even attempting to enforce a valid CONTRACT through the courts, whereby the Court of Appeals of Georgia has summarily, without a hearing on the merits at the trial
court level, vitiated the CONTRACT based upon a latter adopted procedural statute under the Georgia Civil Practice Act, without compensation, in violation of PETITIONER's rights, *inter alia*, under Article I, Section

10 of the United State Constitution.

Whether the anti-SLAPP statute of Georgia violates the Fourteenth Amendment of the United States Constitution, the Due Process Clause, by denying the liberty to contract; by impairing a contract, which is a form of property; by impinging upon PETITIONER'S legislative and judicially created causes of action; by taking property for public use without just compensation and by denying procedural due process, and prohibiting deciding a First Amendment issue on the merits.

Whether public policy implicating the First Amendment, provided by a State to defendants in a statute, supersedes already existing constitutional rights accorded to plaintiffs under the Fourteenth Amendment's Due Process Clause, the Contract Clause, the Equal Protection Clause and PETITIONER'S First Amendment right to petition, and whether such a later promulgated state public policy supersedes longstanding public policy [including the importance of contracts].

Whether the anti-SLAPP statute violates PETITIONER'S Seventh Amendment of the United States Constitution, the right to a jury trial.

Whether Shelley v. Kraemer, 334 U.S. 1 (1948) should be extended by the United States Supreme Court to allow States to pass and enforce statutes which allow persons who agree to non-discriminatory restrictive covenants to later evade those non-discriminatory covenants, based on later adopted public policy that a contract for consideration need not be adhered to notwithstanding that a

contracting party freely and knowingly waived a public policy or First Amendment right as to himself [thereby in effect causing the Contract Clause of the United States to be subordinate to the First Amendment].

STATEMENT OF INTERESTED PARTIES

Petitioner, RONALD S. LEVENTHAL, is the successor in interest by operation of prior contract, of the plaintiff below, PROVIDENCE CONSTRUCTION COMPANY, and PROVIDENCE CONSTRUCTION COMPANY, Post Office Box 680096, Marietta, Georgia 30068.

The Court of Appeals of Georgia, the Honorable Judges McMurray, Dorothy Beasley, and Harold Banke, 334 State Judicial Building, 40 Mitchell Street, S.W., Atlanta, Georgia 30334.

The Honorable Mary E. Staley, Judge of the Superior Court, Cobb Judicial Circuit, 32 Waddell Street, Marietta, Georgia, 30090.

The Honorable Thurbert Baker, the Attorney General for the State of Georgia, 40 Capitol Square, S.W., Atlanta, Georgia 30334-1300.

Mr. D. Todd Markle, attorney for Respondent Dave Bauer, Miller & Markle, L.L.P., 23 Lenox Pointe, N.E., Atlanta, GA 30324.

Respondent, the defendant below, is DAVE BAUER, an individual resident of one of the properties developed by the Petitioner, represented by counsel, D. Todd Markle.

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INTRODUCTION

Petitioner Ronald S. Leventhal ("LEVENTHAL") is the successor in interest to Providence Construction Company, a Georgia Corporation, which was and has been the Plaintiff in this proceeding, which commenced in the Superior Court of Cobb County, State of Georgia below ("PETITIONER"), proceeding pro se (collectively referred to hereinafter as the "PETITIONER")[1].

PETITIONER respectfully petitions this Court for a writ of certiorari to review and vacate a decision of the Court of Appeals of the State of Georgia.

The gravamen of this case focuses on non-discriminatory restrictive covenants of public record (the "CONTRACT"). PETITIONER, a private actor, brought suit against the Dave Bauer (the "RESPONDENT") for breach of the CONTRACT and interference with the CONTRACT. Even though the CONTRACT provided that RESPONDENT would not speak out against the right of PETITIONER to seek rezoning of certain contiguous property, RESPONDENT breached the CONTRACT and incited and interfered with the CONTRACT between PETITIONER and others. This case involves, *inter alia*, the enforcement of a private, but non-discriminatory, contract and the freedom to contract.

In defense of the original COMPLAINT for injunctive relief and damages in the Cobb Superior Court, RESPONDENT raised the newly-

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[1] PETITIONER, *pro se*, is the successor in interest to the Plaintiff-Appellant, *pro se*, Below, by operation of previous contract. If this Court believes that the original Plaintiff Below should also proceed, LEVENTHAL respectfully requests that the PETITIONER be allowed a short extension so PROVIDENCE may appropriately join in this Petition for Certiorari, notwithstanding its not having a future significant interest in the outcome.

A motion is pending in this Court to add LEVENTHAL as a party.

enacted Section 11.1 of the Georgia Civil Practice Act [Official Code of Ga. Ann. § 9-11-11.1], the anti-SLAPP statute of Georgia.[2] RESPONDENT claimed, in essence, that the action filed by PETITIONER against RESPONDENT was an attempt by PETITIONER to "slapp" RESPONDENT's First Amendment right to petition government, even though there was a CONTRACT in place prior to the anti-SLAPP statute, and even though the anti-SLAPP statute provides a right to bring all actions "authorized by common law, statute, law or rule." O.C.G.A. § 9-11-11.1(e).

OPINIONS BELOW AND RECORD

The Superior Court of Cobb County entered an Order on September 18, 1996. APPENDIX "A". The Court of Appeals of Georgia filed its opinion on November 17, 1997. APPENDIX "B". The denials by the Supreme Court of Georgia were one-line, non-opinion denials. APPENDIX "C". The Record referred to in this PETITION is before the Court of Appeals of Georgia and the remittitur is in the Trial Court.

STATEMENT OF JURISDICTION

The Supreme Court of Georgia denied the Petitioners' application on May 23, 1998.

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[2] The anti-SLAPP statute of Georgia was designed as a procedural protection regarding abusive suits brought against citizens who speak out on public matters. In the Georgia State Bar Journal article of June 1997, Volume 2, Page 26 by Kent and Isenberg, entitled Strategic Litigation Against Public Participation, which the Court of Appeals of Georgia cited in its Opinion in the instant case, the authors note that the "paradigmatic SLAPP [suit] involves a developer who sues opponents of his rezoning plan . . . claiming that his opponents have libeled him in writing letters, circulating petitions, and otherwise voicing opposition to the rezoning." [In such matter, the Plaintiff is barred from proceeding in the Courts]. In this matter, there is the CONTRACT wherein the RESPONDENT voluntarily waived his right to oppose rezoning.

APPENDIX C. A timely Notice of Intent to seek Certiorari from this Honorable Court was filed on June 11, 1998 in the Court of Appeals of Georgia. A timely Petition to this Court was filed on August 20, 1998. On August 27, 1998, the Clerk of the Supreme Court of the United States granted PETITIONER sixty (60) days to file a new Petition. This Petition is timely filed on October 26, 1998, within sixty (60) days. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

THE GEORGIA ANTI-SLAPP PROVISION

The so-called anti-SLAPP statute of Georgia provides:

The General Assembly of Georgia finds and declares that

> (a) it is in the public interest to encourage participation by the citizens of Georgia in matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition government for redress of grievances. The General Assembly of Georgia further finds and declares that the valid exercise of the constitutional rights of freedom of speech and the right to petition government for a redress of grievances should not be chilled through abuse of the judicial process.
>
> (b) For any claim asserted against a person or entity arising from an act by that person or entity which could reasonably be construed as an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States

or the Constitution of the State of Georgia in connection with an issue of public interest or concern, both the party asserting the claim and the party's attorney of record, if any, shall be required to file, contemporaneously with the pleading containing the claim, a written verification under oath a set forth in Code Section 9-10-113. Such written verification shall certify that the party and his or her attorney of record, if any, have read the claim; that to the best of their knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; that the act forming the basis for the claim is not a privileged communication under paragraph (4) of Code Section 51-5-7; and that the claim is not interposed for any improper purpose such as to suppress a person's or entity's right of free speech or right to petition government, or to harass, or to cause unnecessary delay or needless increase in the cost of litigation. If the claim is not verified as required by this subsection, it shall be stricken unless it is verified within ten days a the attention of the party asserting the claim. If a claim is verified in violation of this Code section, the court, upon motion or upon its own initiative, shall impose upon the persons who signed the verification, a represented party, or both an appropriate sanction which may include dismissal of the claim and an order

to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

(c) As used in this Code Section, "act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of pubic interest or concern" includes any written or oral statement, writing, or petition made before or to a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, or any written or oral statement, writing, or petition made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.

(d) All discovery and any pending hearing or motions in the action shall be stayed upon the filing of a motion to dismiss or a motion to strike made pursuant to section (b) of this Code section. The motion shall be heard not more than 30 days after service unless the emergency matters before the court require a later hearing. The court, on noticed motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted notwithstanding this subsection.

(e) Nothing in this Code section shall affect or preclude the right of any party to any recovery otherwise authorized by common law, statute, law, or rule.

STATEMENT OF THE CASE
A. INTRODUCTION

PETITIONER brought a suit for breach of contract against RESPONDENT, Dave Bauer, as a purchaser of property subject to the non-restrictive, recorded subdivision covenants of record of the CUMBERLAND CREEK SOUTH COMMUNITY (the "CONTRACT"), which prohibited opposition to specific zonings on land of PETITIONER contiguous to the development in which RESPONDENT purchased his home. The suit also sought damages for RESPONDENT's tortious interference in the covenants between PETITIONER and other property owners, who were subject to the covenants. The suit further sought injunctive relief based upon the CONTRACT.

RESPONDENT answered by raising a defense based upon the First Amendment and Georgia's anti-SLAPP statute. The anti-SLAPP statute, which PETITIONER contends is unconstitutional, as written and as applied, was promulgated approximately ten (10) years after the CONTRACT was recorded in the title chain. The CONTRACT was drafted by Arnall Golden & Gregory, a respected Atlanta, Georgia law firm.

The issues include conflicts between various constitutional rights which should be addressed by this Honorable Court, including a citizen's constitutional right to contract, to due process, to a jury trial and first amendment rights, and whether these constitutional rights are superseded by another citizens right to petition provided by the policy of a statute which cites to the

First Amendment, and when that same citizen has voluntarily waived those rights under a contract.

PETITIONER is a developer, who brought suit based upon the CONTRACT which RESPONDENT became a party upon the purchase of his property. Importantly, as one scholar has noted:

> Not all suits brought by . . . developers . . . against citizens . . . are necessarily properly denominated as SLAPP suits. These rights can be and often are violated. Their constitutional and other legally protected rights are in no way inferior to the rights of those whose causes and commitments we empathize with and support. Stein, "SLAPP Suits: A Slap at the First Amendment," 7 Pace Environmental Law Review, Pg. 48.

The essence of this case is whether the constitutional rights of PETITIONER are inferior to any rights held by RESPONDENT. PETITIONER contends that its constitutional rights -- to contract; to petition government for redress; to protection of its liberty and property interests; to have this case heard on the merits in a meaningful manner and the right to equal protection -- are fundamental and compelling, as opposed to the purported privilege of RESPONDENT to evade a contract based on the anti-SLAPP statute.

Pursuant to the anti-SLAPP statute, "nothing in this Code section shall affect or preclude the right of any party to any recovery otherwise authorized by common law, statute, law, or rule." O.C.G.A. § 9-11-11.1(e). Thus, the General Assembly intended that plaintiffs - even developers - have the

right to pursue valid claims.[3] The COMPLAINT initiated by PETITIONER could not be construed as abusive or frivolous or an impingement of RESPONDENT'S RIGHTS on the part of PETITIONER, because the CONTRACT existed. The CONTRACT was drafted by attorneys at the law firm of Arnall Golden & Gregory, approximately ten (10) years before promulgation of the anti-SLAPP statute.

PETITIONER and RESPONDENT had a binding contract, entered into prior to promulgation of the anti-SLAPP statute. Under the plain meaning of the anti-SLAPP statute, the statute could not preclude the right of PETITIONER to seek recovery under a right of contract -- which is authorized under the common law, Georgia statute and the Constitution of the United States. PETITIONER submits that neither the legislature nor the courts can legitimately promulgate or enforce a statute which unconstitutionally impinges on the right to contract, denies a citizen due process or negatively impacts the First Amendment rights of the same citizen. PETITIONER merely sought judicial help in enforcing non-discriminatory restrictive covenants, of record approximately ten (10) years prior to promulgation of the anti-SLAPP statute of Georgia.[4]

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[3] If the CONTRACT was void under the usual rules applicable to contracts, the Georgia courts could have reached their decisions without even referencing the anti-SLAPP statute. Clearly, the Courts relied upon the anti-SLAPP statute to supply substantive rules and, in this case, such was unconstitutional, denying PETITIONER the right to have a jury determine any purported "vagueness" by parole evidence.

[4] The Georgia Court of Appeals admitted that "an issue raised for the first time on appeal is not considered." OPINION, PP. 7-8. Additionally, the RESPONDENT admits he never raised the defenses of vagueness or overbroadness. RESPONSE OF RESPONDENT TO COURT OF APPEALS, PP. 203.

The PETITIONER never had the opportunity to have

The lower courts only focused on the fact that the waiver by RESPONDENT of his free speech rights was violative of public policy. That is not the issue, however. The courts never addressed the real question of why it was improper for RESPONDENT to merely waive his right to oppose a limited number of zonings solely on particular contiguous properties. This was not a restriction of RESPONDENT's rights or anyone's right to petition the government, in general. The lower courts failure to examine this is improper. Randy Leonard, Grant Coffey, Tom, Chamberlain, Richard Grace, Manual Fagundes, Portland Firefighters Association, Local 43 I.A.F.F. v. J.E. Clark, Richard Bogle, Earl Blumenauer, Mike Lindberg, 12 F.3d 885 (9th Cir. 1992).

The anti-SLAPP statute, as applied, has changed the rules of plaintiffs who seek to enforce either contractual rights or to bring claims for defamation and libel and slander against opponents of zonings to be such that the statutory and case authority of Georgia (including the Contract Clause of the United States Constitution) is applied differently to such plaintiffs. These plaintiffs are therefore denied equal protection because they are denied the right, in the event of an ambiguity, to have the ambiguity decided by a jury by and through the introduction of parole

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the entire CONTRACT reviewed in its entirety, because the Georgia courts merely denied the PETITIONER recourse, even though the PETITIONER followed the procedure outlined by the anti-SLAPP statute, and even though in other contract disputes where the defendant does not defend by averring that the petitioner has tried to "slapp" him, the courts examine the construction of the contract. However, at the appellate stage, the Georgia Court of Appeals *sua sponte* [as *dictum*] raised the issue of vagueness and overbroadness, suggesting a defense for the RESPONDENT, in its Opinion.

evidence and, in the event of a libel or slander action, the plaintiff is denied the right to bring before a jury the statements which the plaintiff asserts are slanderous and libelous by the opponent to the zoning. Therefore, such plaintiffs -- and PETITIONER herein -- are denied equal protection because once a defendant construes the COMPLAINT as involving the anti-SLAPP statute, such a plaintiff is not entitled to redress under those tort statutes and case authority available to all other citizens.

Moreover, the protection of RESPONDENT by the courts of Georgia does not represent the protection of a "public interest," and RESPONDENT is not a member of any protected class. No action by PETITIONER in any way abrogated any public interest or the right of the public at large to speak out or oppose the zoning.

The OPINION offers the unfair statement that "the covenant, which is also vague, would prevent all lot purchasers in a development from exercising a constitutional right to oppose governmental action, which may affect their neighborhoods' character and the properties' value." The CONTRACT was not vague or overbroad. For example, nothing in the CONTRACT would prohibit the lot owners from opposing federal, state or local governmental from seeking to construct a garbage dump or landfill on contiguous property or from providing for a hazardous waste dump or some other chemical facility which was dangerous or injurious to their health. The CONTRACT solely and exclusively prohibited six (6) out of a possible forty three (43) zoning classifications from being affixed to the contiguous tract of land. See Motion for Reconsideration in Court of Appeals.

In a discussion in the OPINION that

commences at Page 5, the Court of Appeals does confirm the view of PETITIONER that outside of a contract to do an immoral or illegal thing (i.e., sell an infant), it is enforceable if the contracting parties choose voluntarily to waive or renounce what the law has established in their favor, provided there is no injury to others or an adverse effect on the public interest. Young v. John Deere Plow Co., 102 Ga. App. 132, 135, 115 S.E.2d 770 (1960). The Court, however, suddenly abandons that settled Georgia law and simply states that the CONTRACT violates public policy and does not explain why the right of the contracting parties to waive what the public policy provides subsequently, is not proper.

While the OPINION enunciates in generalities a benevolent interest in the rights of citizens to speak out, no such prohibition was set out by the CONTRACT. In reality, this matter involves the state prohibiting developers and purchasers in their developments from entering into, voluntarily, for fair consideration and at arms length, knowingly entering into any contract affecting and governing the long term viability of the development, including the development of contiguous tracts.

B. FACTS

PETITIONER CONSTRUCTION COMPANY ("PETITIONER"), predecessor to and through RONALD S. LEVENTHAL ("LEVENTHAL"), brought suit against RESPONDENT and others based on the CONTRACT. The verified Complaint alleged that RESPONDENT breached the contract, which included the covenant of record, Deed Book 4097, Page 208 of the Records of the Clerk of the Superior Court of Cobb County, State of Georgia, filed September 2, 1986 and denominated AMENDED AND RESTATED CUMBERLAND CREEK SOUTH DECLARATION OF COVENANTS, RESTRICTIONS AND EASEMENTS (the "CONTRACT"),

which CONTRACT provides in part:

> By acceptance of the deed conveying a Lot, each Owner acknowledges the foregoing plan [to rezone] and agrees not to oppose any application to amend the zoning ordinances or any petition seeking a variance of the zoning laws. . . [including] all contiguous land in which Declarant and/or Managing Declarant presently has or may hereafter acquire an interest.

RESPONDENT breached the CONTRACT he had with PETITIONER by actively speaking out and acting against the zoning change sought by PETITIONER with respect to property contiguous to the neighborhood in which RESPONDENT lives, including to the zoning board (the Board of Commissioners of Cobb County, State of Georgia). PETITIONER stressed its property rights, which are governed under the Constitution of the United States, in the COMPLAINT. See COMPLAINT, including ¶ 53 (R-12). PETITIONER stressed its right to contract, protected under the Constitution of the United States, in the COMPLAINT. See COMPLAINT (R-12). PETITIONER raised these constitutional issue in the COMPLAINT by means of averments and statements of facts.[5]

RESPONDENT defended on the basis of the anti-SLAPP statute, which was promulgated

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[5] The PETITIONER believed the dispute in this case involved a private contract; the PETITIONER did not specifically refer to the constitution in the COMPLAINT. However, all of the constitutional arguments of the PETITIONER should be considered by this Court because the PETITIONER reasonably construed all actions taken, and all mention of its constitutional rights, as containing the issues of due process, the contract clause, equal protection, First Amendment and right to a jury trial. See Hetzel v. Prince William County, 118 S.Ct. 1210 (1998).

subsequent to the entry by RESPONDENT into the CONTRACT with PETITIONER. RESPONDENT entered into the CONTRACT, for consideration, knowingly and with an equal bargaining position. There is no testimony to the contrary.

C. PROCEEDINGS BELOW

PETITIONER, a private actor, was denied his day in court based on purportedly violating RESPONDENT's free speech. PETITIONER was not permitted to be heard on the merits, based on a procedural requirement in the anti-SLAPP statute.

PETITIONER, proceeding pro se through its president and successor, LEVENTHAL, brought suit against RESPONDENT on June 17, 1996 based on the CONTRACT, the non-discriminatory restrictive covenants.

PETITIONER contended that RESPONDENT violated his obligations and otherwise interfered in contractual relationships PETITIONER had with other lot owners in Cumberland Ridge. (R-12, COMPLAINT ¶ ¶ 35-61, 65 and 68-71).

On August 13, 1996, RESPONDENT filed a document denominated MOTION TO STRIKE OR, IN THE ALTERNATIVE, MOTION TO DISMISS AND MEMORANDUM OF SUPPORTING AUTHORITY (the "RESPONDENT MOTION TO DISMISS"), seeking to dismiss the COMPLAINT of PETITIONER. In RESPONDENT MOTION TO DISMISS, RESPONDENT asserted that the actions he took against the interests of PETITIONER were in furtherance of his right of free speech and were protected by O.C.G.A. §§ 9-11-11.1 and 51-5-7, ignoring the CONTRACT (the anti-discriminatory restrictive covenants of record since 1986). This manner and method of constitutional issues were raised again in this defensive pleading. See RESPONDENT'S MOTION TO DISMISS, ¶ 4 (R-92),

where RESPONDENT states:

> The alleged conduct on the part of Defendant RESPONDENT about which Plaintiff complains constitute actions in furtherance of the right of free speech and/or the right to petition government for the redress of grievances under the Constitution of the United States and the Constitution of the State of Georgia in connection with an issue of public interest or concern as defined in O.C.G.A. sections 9-11-11.1 and 51-1-7.

At the same time that RESPONDENT filed RESPONDENT MOTION TO DISMISS, he also filed an Answer, denominated ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM FOR DECLARATORY RELIEF (the "ANSWER"), wherein under his First Defense and Eighth Defense he contends his actions are protected under the Constitution and Laws of the State of Georgia and United States and his right of free speech. See ANSWER (R-8). Thus, the stage in the proceedings where constitutional issues were first raised and sought were at the time of the ANSWER. PETITIONER did not raise constitutional issues in the COMPLAINT, because the matter concerned the rights and obligations under the CONTRACT.

In two (2) written responses to RESPONDENT MOTION TO DISMISS, PETITIONER asserted, *inter alia*, that the anti-SLAPP statute did not guarantee free speech, but provided a penalty and procedural mechanism to deal with lawsuits brought without privilege and to thwart opposition to public participation in zoning matters. (R-161 at

174 and R-128 at 141-2). [6]

On September 18, 1996, the Superior Court granted RESPONDENT'S MOTION TO DISMISS and entered an Order (the "ORDER").(R-176). The Superior Court held:

> The covenants with which the Plaintiff alleges the Defendants tortuously interfered are not binding upon the Defendants and are therefore, unenforceable because to the extent that the covenants attempt to limited the Defendants right to free speech and petition in direct contravention of the First Amendment, the covenants are contrary to public policy. ORDER, ¶ 4.

The Superior Court disregarded the clear language and intent of the CONTRACT, and determined that the intent of PETITIONER in filing the COMPLAINT was to chill the expected opposition by RESPONDENT to a rezoning application at a Cobb County Board of Commissioners meeting. The trial court treated this case as if no contractual relationship, privilege and obligations existed between PETITIONER and RESPONDENT.

PETITIONER filed a timely NOTICE OF APPEAL on October 18, 1996. (R-1), noting, among other things, that there were no laws which prohibit private citizens, such as RESPONDENT, from contracting away rights afforded under the First Amendment. Docketing was on April 8, 1997 in the Court of Appeals. PETITIONER timely filed its Brief in the Court of Appeals.

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[6] PETITIONER requested permission to amend to cure any defects in the responses. See Friedlander v. Nims, 755 F. 2d 810, 812 (11th Cir. 1985).

RESPONDENT filed his BRIEF OF APPELLEE on May 19, 1997. In the BRIEF OF APPELLEE, RESPONDENT stated that:

> "The trial court correctly found that [the lawsuit by PETITIONER against RESPONDENT] was violative of the public policy of the State of Georgia where the sole allegation against [RESPONDENT] involved his speaking out at a public hearing before the Cobb County Planning Commission. The trial court properly applied O.C.G.A. § 9-11-11.1 . . . and dismissed the case as authorized by said statute."

However, RESPONDENT also admitted that "[h]ad the covenants not impinged on RESPONDENT's First Amendment rights, PETITIONER is correct that perhaps injunctive relief and monetary damages would be appropriate." Pg. 15, BRIEF OF APPELLEE.

The Court of Appeals then entered its OPINION. In the OPINION, the Court of Appeals, which was provided only a partial portion of the covenant, then determined that "[t]his restrictive covenant is unenforceable as against public policy." See OPINION, PP. 4-5. The court's analysis includes a statement of law that a contract is contrary to public policy if the General Assembly declares it to be so, and if it is against policy, it cannot be enforced.

The Court of Appeals of Georgia also concluded, seemingly as dictum, "in light of the anti-SLAPP statute," that the CONTRACT was overly broad regarding "any and all contiguous land" and vague because "it would prevent all lot purchasers in a development from

exercising their constitutional rights to oppose government action. . . "

PETITIONER sought reconsideration on December 1, 1997 in the Georgia Court of Appeals. Petitioner's Motion for Reconsideration was denied December 5, 1997. PETITIONER filed a notice of its intent to seek certiorari from the Georgia Supreme Court with the Court of Appeals on December 15, 1997. On December 29, 1997, PETITIONER timely filed a Petition for Certiorari in the Supreme Court of Georgia.

On May 1, 1998, the Supreme Court of Georgia, without comment, denied the petition for certiorari brought by PETITIONER. On May 11, 1998, PETITIONER brought a Motion for Reconsideration. On May 22, 1998, the Motion for Reconsideration was denied.

On August 20, 1998, PETITIONER [LEVENTHAL, as successor to PETITIONER] filed a Petition for Writ of Certiorari with the Supreme Court of the United States. On August 27, 1998, the Clerk of the Supreme Court of the United States, William K. Suter, by and through Ruth Jones, returned the Petition to LEVENTHAL and PETITIONER, noting it failed to comply with the Court's Rules of Procedure. LEVENTHAL advised th Court of a processing problem with the final generation of the Petition. The Clerk kindly sent a sample Petition and allowed sixty (60) days to correct the Petition, pursuant to Rule 14.5. The instant re-formatted and correct Petition for Certiorari was timely filed and served this date.

ARGUMENT AND CITATION OF AUTHORITY

Anti-SLAPP statutes have been enacted in several States, including, *inter alia*, Georgia, California, Massachusetts, Minnesota and Rhode Island. Other States, including New

Hampshire, have refused to pass an anti-SLAPP statute because of concerns regarding, among other things, Constitutional violations. See Opinion of the Justices (SLAPP Suit Procedure), 138 N.H. 445, 641 A.2d 1012 (Supreme Court of New Hampshire, 1994). Additionally, States which have enacted anti-SLAPP statutes have had to address the Constitutional problems inherent in the anti-SLAPP statutes, with varying results.[7] The conflicts exist, and are growing, not only between the States, but within the States. *Compare* Los Carneros Community Associates, Inc. v. Penfield & Smith Engineers, Inc., 65 Cal App. 4th 168, 76 Cal. Rptr. 2d 396 (1998) and Macias v. Hartwell, 55 Cal. App. 4th 669, 64 Cal. Rptr. 2d 222 (1997).

A statute cannot be applied by the Courts consistently with the obligations of the Judges pursuant to the Supremacy Clause, when the application of the statute conflicts with the Constitution. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). The anti-SLAPP statute conflicts with the

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[7] Heller, "Who's Slapping Whom," California Lawyer, November 1997; Rich, "Hometown Properties, Inc. v. Fleming, 680 A.2d 561 (R.I. 1996), 2 Roger Williams U.L. Rev. 425 (Spring 1997); "The Legal Literature on SLAPPS: A Look Behind the Smoke Nine Years After Professors Pring and Canan First Yelled 'Fire!'", 9 U.Fla. J.L. & Pub. Policy 85 (Fall, 1997); Mendez, "SLAPP Attack: Has Public Concern Gone South in Massachusetts?", 42 MAR B. B.J. 6 (March-April 1998) and Arco, "When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation," 52 U. Miami L. Rev. 587 (January, 1998) (where the writer stressed that "[b]alancing the competing interests of the First Amendment right to petition government for redress of grievances and securing ready access to courts has proven to be problematic. The anti-SLAPP laws do not seem to address this problem; instead, they are deliberately vague . . . [L]ooking at the decisions . . . reveals very little consistency among the jurisdictions -- even among different districts within the same state, purportedly applying the same statute. . . ." Id. at 614.

constitutional rights of PETITIONER in many ways.

1. **The anti-SLAPP statute of Georgia violates the Contract Clause**

The State of Georgia does not have a compelling, or even legitimate, interest in preventing PETITIONER-seller, through an arms-length CONTRACT, from securing an agreement from RESPONDENT-purchaser, prohibiting RESPONDENT-purchaser from entering into an arms-length agreement as a matter of personal choice whereby each obtains the benefits desired resulting from the purchase and sale.

The State of Georgia has prevented PETITIONER from attempting to enforce a CONTRACT through the courts, without a hearing on the merits, vitiated the CONTRACT in its entirety, based upon a latter adopted procedural statute under the Georgia Civil Practice Act, the anti-SLAPP statute, without compensation, in violation of PETITIONER's rights.

Article 1, Section 10 of the United States Constitution, the Contract Clause, provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." A law impairs a contract if it substantially invalidates, releases or extinguishes the obligations of a contract. See, e.g., Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1923). The parties are held to have adopted the contract according to the law in effect at the time the contract was entered into.

The legislature can modify a private contract only if it serves an important public interest, is necessary for the achievement of the public interest and is a reasonable impairment of the contract. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). In

Allied, the Supreme Court decided that the State law at issue, as applied, violated the Contract Clause of the United States Constitution and emphasized that "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear." 438 U.S. at 245.

While the anti-SLAPP statute advances what may be an important governmental interest, it is not necessary for achievement of that public purpose. The United States Constitution already protects the "constitutional rights of freedom of speech and the right to petition" when there is state action. Thus, there are already procedures in place to safeguard the constitutional right of free speech by a state actor. "[A] State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." United States Trust Company of New York v. New Jersey, 431 U.S. 1, 30, 97 S. Ct. 1505 (1977), reh. den., 431 U.S. 975, 97 S. Ct. 2942.

The impairment on the CONTRACT was substantial. It affected multiple, compelling interests of PETITIONER: the right to substantive due process; the right to procedural due process; the right of PETITIONER to petition government; the right to equal protection; the right to contract[8] and the right to a jury trial.

If a substantial impairment is found, the State, in justification, must have, at a minimum, significant and legitimate public purpose behind the regulation." Energy Reserves Group, Inc. v. Kansas Power and Light

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[8] The CONTRACT was also impaired by the failure of the Georgia Courts to apply Georgia law pertaining to the interpretation and enforcement of contract. See fn. 9, infra.

Company, 459 U.S. 400, 103 S.Ct. 697 (1983). As noted above, when the impairment is severe, the justification is scrutinized extremely carefully. See Allied, supra.

> Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them. Allied, 438 U.S. at 245.

The anti-SLAPP statute retroactively modified, and substantially and permanently -- without proper justification -- impaired the existing CONTRACT between PETITIONER and RESPONDENT. A latter adopted statute which provides a public policy proclamation is not sufficient justification to impinge upon the constitutional rights of PETITIONER to *inter alia*, fundamental rights such as due process and the right to petition government. The anti-SLAPP statute substantially invalidated the CONTRACT and, at the same time, severely impacted the constitutional rights of PETITIONER.[9]

2. The anti-SLAPP statute of Georgia violates the Due Process Clause

The Fourteenth Amendment protects against deprivation of "life, liberty, or property

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[9] Further, the United States Constitution, Article I, Section 1, Paragraph 10, prohibits the *ex post facto* impairment of the obligations of the parties to an existing contract by later adopted legislation. Lynch v. United States, 292 U.S. 571, 54 S.Ct. 840 (1934) (contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce the contract by legal process is taken away or materially lessened).

without due process of law." "Liberty" and "property" are defined broadly. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701(1972). The Fourteenth Amendment, under procedural due process, mandates procedural safeguards and protects liberty and property interests.

a. The anti-SLAPP statute denies the liberty and property interest rights of PETITIONER

The right to contract is protected by the "liberty" aspect of the Due Process Clause. Board of Regents v. Roth, 408 U.S. 564 (1972).[10]

Contract rights are also a form of property. United States Trust Company, supra. Additionally, there is a property interest in a legislative or judicially created cause of

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[10] "The obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to **interpretation and enforcement**. '[The Supreme Court of the United States] has said that 'the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." (citations omitted) (emphasis added). This principle presumes that contracting parties adopt the terms of their bargain in reliance on the law in effect at the time the agreement is reached." United States Trust Company of New York v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505 (1977), reh.den., 431 U.S. 975, 97 S.Ct. 2942. Further, issues regarding breach of contract are to be tried by a jury. See, e.g., Borgh v. Gentry, 953 F.2d 1309 (11th Cir. 1992) and infra regarding the Seventh Amendment right to jury trial analysis.

"A claim that a State statute impairs the obligation of contract is an appeal to the United States Constitution, **and cannot be foreclosed by a State court's determination whether there was a contract or what were its obligations."** Atlantic Coast Line R. Co. v. Phillips, 67 S.Ct. 1584 (1947) (emphasis added).

action. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

PETITIONER was denied its right to contract. Thus, PETITIONER was deprived of constitutionally protected "liberty" and "property."

b. The anti-SLAPP statute, as applied, took the property of PETITIONER without just compensation and therefor was an unconstitutional taking

The government must pay just compensation if it takes private property for public use. A "taking" by the government includes not only actual physical taking of the property (for example, by eminent domain to create a freeway) but also includes government action that damages property or impairs its use. A contract is included under the definition of "property." United States Trust Company, supra.

As applied to the instant matter, the anti-SLAPP statute has destroyed the previously existing rights of property and contract held by PETITIONER.[11]

c. The anti-SLAPP statute and its application by the Courts of Georgia have deprived PETITIONER of procedural due process

The Due Process Clause of the Fifth Amendment protects "liberty" and "property" rights from impairment without the appropriate procedural protection in the form of notice and proper hearing.

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[11] This case is different than a zoning matter, because there was no zoning ordinance at issue; rather, the case focused on whether the RESPONDENT had a right to speak out on a zoning change.

Once the Court has determined that a person has been deprived of liberty or property, then the Court must analyze what procedures to supply. The Court performs a "balancing" of interests: (a) the importance of the interest to the individual; (b) the ability of additional procedures to increase the accuracy of the fact-finding and (c) the government interest in administrative efficiency. Mathews v. Eldridge, 424 U.S. 319 (1976).

First, as shown above, there was a deprivation of both the liberty and property rights of PETITIONER.

Second, PETITIONER has had its Constitutional rights impinged upon: the interests in liberty and property; contract rights; First Amendment rights; right to Equal protection and right to a jury trial. The interests of PETITIONER were trampled upon. The Trial Court merely reviewed the anti-SLAPP required Affidavit, submitted by PETITIONER, but ignored the fact that the Affidavit met the procedural requirements of the anti-SLAPP statute. The Affidavit set forth facts which showed it was "well grounded in fact" and "warranted by existing law," noting the CONTRACT, recorded approximately ten (10) years before the anti-SLAPP statute was promulgated. The trial court made its own determination regarding the state-of-mind of PETITIONER, disregarding the fact of the existence of the CONTRACT, treating PETITIONER as if he had no contract privilege to seek to enforce. [12]

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[12] It has been held that the First Amendment can only be violated if acts taken are done solely with "intent." See Waters v. Churchill, 511 U.S. 661, 114 S.Ct. 1878 (1994); Cameron v. Johnson, 390 U.S. 611, 88 S.Ct. 1335 (1968); Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 2698 (1972). As noted supra, the Ceorgia

The trial court then decided that the cause of actions brought by PETITIONER against RESPONDENT were an attempt by PETITIONER to "slapp" RESPONDENT, even though a written contract, the restrictive covenants of record, the CONTRACT, were in the public record. Once the trial court decided that the anti-SLAPP statute applied, the COMPLAINT by PETITIONER was dismissed without the opportunity of PETITIONER to, *inter alia*, discovery, examination of witnesses, parole evidence, etc. This certainly was not "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" 424 U.S. at 332.

This Court has held that it is a deprivation of liberty or property if the standard of proof is too lax to make a reasonable assurance of accurate fact finding. Addington v. Texas, 441 U.S. 418, 423 (1979). A statute which operates to deny a fair opportunity to repel or to present facts is void. Bailey v. Alabama, 219 U.S. 219 (1911) [dealing with presumptions, but relevant to this matter].

Next, the "administrative burden and other societal costs" must be balanced. Id. At 319. In order for a "meaningful" opportunity to be heard, done in a "meaningful manner," any administrative burden of assuring proper fact-finding, etc. and the societal costs of failing to do so weigh heavily in favor of PETITIONER, particularly in this case, where Constitutional rights are at stake.

Finally, this Court has held that if a plaintiff never has the opportunity to introduce evidence in rebuttal with respect to

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courts disregarded the intent of the PETITIONER to pursue a claim based on the CONTRACT.

material the appellate court considered material, the plaintiff is deemed to have been deprived of his rights without due process of law. Sanders v. Shaw, 244 U.S. 317 (1917). *Compare*, Marchant v. Pennsylvania R.R., 153 U.S. 380, 386 (1894). It follows that, without a full and fair trial, PETITIONER has not been afforded due process.

d. The anti-SLAPP statute and its application by the Courts of Georgia has deprived PETITIONER of equal protection

The Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

There is more than one test for the standard of review, depending upon the interest affected or the classification involved. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995 (1972). Since fundamental rights are affected in this case, the standard this Honorable Court uses is strict scrutiny.[13]

When fundamental rights are involved, there is no presumption that the state law is constitutional. Rather, the state must show the interest the state has is compelling, the statute itself is necessary, and that there are no less restrictive means for the state to achieve this compelling interest. Id.

The anti-SLAPP statute impermissibly discriminates against plaintiffs by ignoring a plaintiff's rights to proper procedural due process, substantive due process, First

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[13] Even on the lower standard, rational basis test, or the intermediate level of scrutiny, the anti-SLAPP statute is so egregious that it would still be unconstitutional.

Amendment rights, right to a jury trial and by treating plaintiffs, including PETITIONER differently from other plaintiffs in similar situations, *inter alia*, on contract interpretation and the admissibility of parole evidence.

PETITIONER has been denied its First Amendment and Due Process rights, and that is sufficient for this Court to review the anti-SLAPP statute with strict scrutiny. As noted above, the rights of PETITIONER to contract and right to a jury trial have also been impinged by the anti-SLAPP statute which is to be "procedural" only to make a plaintiff "stop and think" before filing a complaint.[14]

3. The First Amendment policy provided by the anti-SLAPP to defendants by statute does not supersede the constitutional rights accorded to a plaintiff under the Due Process Clause, Contract Clause, Equal Protection Clause and the First Amendment, and does not supersede longstanding public policy.

The issue becomes whether the **policy** of O.C.G.A. § 9-11-11.1 supersedes the **constitutional** rights of PETITIONER. Clearly, policy does not take precedence over PETITIONER'S constitutional rights. [15]

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[14] Further, the anti-SLAPP statute is vague. There is no information regarding how to set out fully the Affidavit (as Petitioner believed he had) so that a plaintiff can proceed on the merits, including resolving any purported vagueness because of the Application of the Anti-Slapp Statute, as is afforded by permitting appropriate evidence to explain any such vagueness. In this matter, the clear evidence would have been based on the zoning ordinance of Cobb County, Georgia § 3-28-3.0 and the official maps of the County, that neither vagueness or overbroadness existed.

[15] Dicta in Hudgens v. N.L.R.B., 424 U.S. 514, 96 S.Ct. 1029, 1033 (1976), indicates statute may extend protection or provide redress against a person who seeks to abridge the free expression of others, but that such protection is not provided by the Constitution itself.

As applied to PETITIONER, the anti-SLAPP statute extended a policy to the defendant-RESPONDENT which implicitly placed the plaintiff-PETITIONER, a private actor, in the role of a state actor, a role PETITIONER did not seek, having merely brought an action on a private contract.

In Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 98 S. Ct. 1729 (1978), the self-help statute of New York was not considered state action. The United States Supreme Court found against that issue [similar to this matter] of whether or not something which was clearly a "purely private dispute" is deemed a matter of state enforcement merely because the court's are used to enforce what is otherwise a private contract. Id. at 1735.

PETITIONER, a private actor, could not impinge a constitutional right of RESPONDENT. The Anti-SLAPP statute cannot supersede the constitutional rights accorded PETITIONER pursuant to the Due Process Clause, Equal Protection Clause, First Amendment, Contract Clause and Seventh Amendment and longstanding public policy in the United States and Georgia regarding the right to contract, including rights of RESPONDENT to waive his First Amendment rights, which is permissible. See Curtis Publishing Co. v. Butts, 388 U.S. 130,

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Thus, the anti-SLAPP statute may appropriately announce a policy and allow a proper defensive move by a defendant, but that is still policy and not protection provided by the Constitution. Conversely, the protections which should have been afforded the PETITIONER in this matter are grounded in the Constitution, not merely policy.

87 S.Ct. 1975 (1967).[16]

The right to petition government includes filing a complaint in Court, for redress of grievances "and is an assurance of a particular freedom of expression." McDonald v. Smith, 472 U.S. 479, 105 S.Ct. 2787 (1985). Thus, PETITIONER clearly had a constitutional right to petition government, not merely a stated policy, which was impinged by the application of the anti-SLAPP statute. See also California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609 (1972). Additionally, the McDonald Court stated that "baseless litigation is not immunized by the First Amendment right to petition." 472 U.S. at 484. It follows that

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[16] Additionally, the Court would have to determine, on the merits and as a matter of substantive law and contract law, whether the waiver was clear and compelling. See Curtis. See also Paragould Cablevision, Inc. v. City of Paragould, 930 F.2d 1310 (8th Cir. 1991) (where the Eighth Circuit agreed that Cablevision bargained away some of its free speech rights by entering into the contract and could not "invoke the first amendment to recapture surrendered rights"); In re George F. Nord Bldg. Corporation, 129 F.2d 173 (7th Cir. 1942) (where the Seventh Circuit stressed that "the right of free speech guaranteed by the Constitution . . . is not an absolute right. It is a relative right that may be modified in its interplay with the rights of others, and it may be waived by the party for whose benefit it was intended") and Armuchee Alliance v. King, 922 F.Supp. 1541 (N.D. Ga. 1996) (right of access to the courts is an aspect of the First Amendment right to petition the government for redress of grievances, and as judicial access must be adequate, effective and meaningful, party denying access need not literally bar the courthouse door or attack plaintiff's witnesses to create an unconstitutional denial of access [PETITIONER denied right to petition government with its denial of its COMPLAINT]. The right of PETITIONER to show that, under substantive law, contract law and on the merits, any waiver by RESPONDENT was done willingly, was denied by the Georgia Courts. The Georgia Courts also ignored "clearly established law" of Georgia, O.C.G.A. § 1-3-7, which provides: "It is also clearly established law of the state [of Georgia] that one may waive a constitutional right."

a baseless defense should not be immunized, and a baseless defense would include a defense based upon an unconstitutional statute, or the ignoring by a defendant of a contract.

The Supreme Court has stated that "[w]e agree that it is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures." Waters v. Churchill, 511 U.S. 611, 114 S.Ct. 1878 (1994). In this case, the First Amendment rights of PETITIONER, as well as the other constitutional rights of PETITIONER, were not "applied through reliable procedures" and were barred by prior restraint. [17] It would be improper to elevate the policy of the anti-SLAPP statute in favor of RESPONDENT, over the unequivocal First Amendment constitutional rights of PETITIONER. See 472 U.S. at 485.

There is no reasonable or compelling state interest in discriminating against plaintiffs who seek redress in the Court on contracts of this nature, depriving PETITIONER of the available procedures on contract enforcement and interpretation available to other Plaintiffs.

4. The anti-SLAPP statute violates the Seventh Amendment of the United States Constitution, the right to a jury trial.

The Seventh Amendment provides that "in suits at common-law, where the value in

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[17] Even if the anti-SLAPP statute did somehow impact the First Amendment rights of the RESPONDENT, this Court seems not to be inclined to add special procedures to First Amendment cases. See Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482 (1984) (rejecting any suggestion that the First Amendment enter into jurisdiction analysis because there are already constitutional limitations and therefore special procedures are not required).

controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . " Georgia guaranteed this right in its state constitution in 1777. Ga. Const., Art. LXI (1777). When a state court is involved with a federally created right, the state may not eliminate the trial by jury. See Dice v. Akron, C & Y.R.R., 342 U.S. 359 (1952).

This matter involves a controversy which exceeds twenty dollars and a federally created right is involved: the United States Constitution. Therefore, the anti-SLAPP statute is improper because a state may not eliminate the trial by jury.[18] See Hetzel v. Prince William County, __U.S.__, 118 S.Ct. 1210 (1998) (holding the Court of Appeals violated the Seventh Amendment right to a jury trial). Cases which involve legal rights, such as issues regarding contracts, give rise to a jury trial right. Wooddell v. International Brotherhood of Electrical Workers, 502 U.S. 93, 112 S.Ct. 494 (1991).[19]

5. Shelley v. Kraemer should not be extended to allow states to pass laws which allow persons who agree to non-discriminatory restrictive covenants to evade those covenants

The Fourteenth Amendment restricts government action, not the action of private citizens. If a state court enforces discriminatory restrictive covenants, that does amount to state action. Shelley v.

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[18] The Eleventh Circuit has held that trial by jury is appropriate on contract claims. Borgh v. Gentry, 963 F.2d 1309 (11th Cir. 1992). See also Stewart v. KHD Deutz of America, Corporation, 75 F.3d 1522 (11th Cir. 1996)

[19] See also Clayton v. Deverell, 257 Ga. 653, 362 S.E.2d 364 (1987) (Georgia Supreme Court says right to jury trial inviolate with regard to cases where there was a right to jury trial under the common law).

Kraemer, 334 U.S. 1 (1948). As compared to Shelley, the instant case deals with non-discriminatory restrictive covenants, and an attempt by a defendant to block the enforcement. There never was enforcement of restrictive covenants by a state court, as was the case in Shelley.

When courts act to enforce the right of a private party which is permitted but not compelled by law, there is no "state action" for constitutional purposes in absence of finding that constitutionally impermissible discrimination is involved. See United Egg Producers v. Standard Brands, Inc., 44 F.3d 940 (11th Cir. 1995).

REASONS FOR GRANTING THE WRIT

There is already conflict between the States regarding similar anti-SLAPP statutes, and the impact of anti-LAPP statutes on Constitutional rights. With this evolving attack on the freedom of private citizens to contract (including to secure from other private parties limited waivers of First Amendment rights) for fair consideration, the ability to rely upon previously valid contracts based on later enacted statutes, or otherwise, is abrogated, thereby undermining the essence of our Nation's ability to carry out business in an orderly fashion.

CONCLUSION

PETITIONER prays this Honorable Court vacate the OPINION below, by the issuance of a Writ of Certiorari from this Honorable Court to the Court of Appeals of Georgia and all courts below.

This 26th day of October, 1998.

Respectfully submitted,
PETITIONER:

/s

RONALD S. LEVENTHAL
Successor to
PROVIDENCE CONSTRUCTION
COMPANY, Proceeding Pro Se

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APPENDIX

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

PROVIDENCE CONSTRUCTION COMPANY a Georgia corporation,	
vs.	**CIVIL ACTION CASE NUMBER**
DAVE BAUER, a Georgia resident, **QUINCE BRINKLEY**, a Georgia resident, **DENICE BRINKLEY**, a Georgia resident, **KEITH LaBORDE**, a Georgia resident, **ARTHUR AMONS**, a Georgia resident, and **RICHARD KNOWLEN**, a Georgia resident, et al.	**CASE NUMBER** 96-104382-28 **JUDGE MARY STALEY**

ORDER

The Court, having read and considered the full record and all submissions and arguments in brief of counsel and having reviewed applicable statutory authority and case law, hereby grants the Defendant Dave Bauer's Motion to Dismiss pursuant to O.C.G.A. § Section 9-11-11.0(b). O.C.G.A Section 9-11-11.1(b) was enacted by the General Assembly of Georgia to protect and encourage citizen participation in public processes by safeguarding the constitutional rights of free speech and petition. This section was designed to accomplish this goal by: 1) covering any claim against a person or entity that arises from an act by the person or entity which "could be reasonably construed as

an act in furtherance of the right of free speech or the right to petition government . . . . in connection with an issue of public interest or concern" O.C.G.A. Section 9-11-11.1(b); 2) requiring that the party and the party's representative, if any, filing such a claim must also file a written verification certifying that the claimant has a reasonable belief (a) that the claim is supported by existing law or supported by a good faith argument that existing law should be changed and (b) that the claim was not filed for the purpose of chilling the rights of free speech and petition; and 3) mandating the imposition of appropriate sanctions, which may include dismissal, if the claim is not verified or if the claim is verified in violation of the section.

The Court finds that O.C.G.A. Section 9-11-11.1(b) is applicable to the Plaintiff Providence's claim for tortuous interference with contractual relations based on the following findings of fact and conclusions of law:

1) Plaintiff Providence filed a civil complaint against the non-governmental individual Defendants seeking injunctive relief and damages and alleging that the Defendants had tortuously interfered with the Plaintiff's contractual relations by speaking out in opposition to the Plaintiff's rezoning application in violation of subdivision covenants.

2) Defendants are homeowners in the Cumberland Ridge subdivision that is adjacent to the property for which the Plaintiff sought rezoning. The Plaintiff originally owned the Cumberland Ridge property as well. However, prior to conveying the property that became the Cumberland Ridge subdivision, the Plaintiff placed restrictive covenants on the lots prohibiting the homeowners from opposing and rezoning application.

3) None of the Defendants was a party to the original sales contracts that contained the restrictive covenant. The court notes, however, that this fact is not dispositive in any way on the issue of the validity of the restrictive covenant.

4) The covenants with which the Plaintiff alleges the Defendants tortuously interfered are not binding upon the Defendants and are therefore, unenforceable because to the extent that the covenants attempt to limit the Defendants rights to free speech and petition in direct contravention of the First Amendment, the covenants are contrary to public policy. Additionally, because the covenant does not touch or concern the Defendants' land, the covenants do not run with the land and therefor, are not binding on successor owners.

5) When the Defendants became aware that an application for rezoning had been filed for the property adjacent to the Cumberland Ridge subdivision, they spoke out in opposition to the application when it was heard by the Cobb County Planning Commission out of concern that the proposed rezoning would negatively impact the value of their respective properties. The Planning commission recommended denial of the Plaintiff's rezoning application.

6) Plaintiff filed its claim against the Defendants on June 17, 1996 the day before the June 18 County Board of Commissioners meeting during which the Board was to review the Planning Commission's recommendation to deny the rezoning application.

7) The Plaintiff's complaint named twenty individual defendants and John Doe defendants.

8) The Plaintiff's claim arises from the Defendant's communications in opposition to the rezoning to the Planning Commission, a legislative body. See O.C.G.G. Section 9-11-11.1(c). The Defendants' communications are related to issues of public interest or concern. See O.C.G.A. Section 9-11-11.1(b).

9) The Plaintiff's claim is verified in violation of O.C.G.A. Section 9-11-11.1(b) because: (a) the claim against the Defendants for tortuous interference with contract for violating the restrictive covenant is not supported by existing law nor is it supported by a good faith argument that existing law should be changed and (b) the claim was filed in a clear attempt to chill the Defendants' expected future opposition to the rezoning application at the County Board of Commissioners meeting and to deter others from joining the opposition by indicating that anyone who speaks out will be subject to high litigation costs and the possibility of civil liability for both compensatory and punitive damages.

By enacting O.C.G.A. Section 9-11-11.1(b), the General Assembly of Georgia sent a clear message to all potential litigants that lawsuits brought in Georgia in response to a person's valid exercise of his constitutional rights of free speech and petition to a governmental body will be subject to special judicial scrutiny. The General Assembly has communicated to Georgia citizens that it is the policy of this state to protect diligently citizen participation in matters of public interest by ensuring that citizens are not harassed, intimidated or threatened into silence.

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional right of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. DeJonge v. Oregon, 299 U.S. 353, 365 (1937).

SO ORDERED, this 18th Day of September, 1996.

s/
Mary E. Staley,
Judge Superior Court
of Cobb County
Cobb Judicial Circuit

FIRST DIVISION
McMURRAY, P.J.,
BEASLEY, J., and
SENIOR APPELLATE JUDGE HAROLD R. BANKE

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 37, January 1, 1995)

November 17, 1997

In the Court of Appeals of Georgia

A97A1630. PROVIDENCE CONSTRUCTION COMPANY V. BAUER. Bea-94

BEASLEY, Judge.

This case presents the Court its first opportunity to apply the provisions of OCGA § 9-11-11.1. This 1996 law, sometimes referred to as an "anti-SLAPP" statute, is designed to prevent "Strategic Litigation Against Public Participation." See Kent & Isenberg, "Georgia's New Anti-SLAPP Statute," Ga. Bar J., (June 1997), at 26.

Providence Construction Company brought this suit against Dave Bauer and other residents of Cumberland Ridge, a Cobb County subdivision developed by Providence. Providence is represented in court by its president, who is not a member of the State Bar of Georgia, but the appeal was docketed on April 8, 1997, before the rule in Eckles v. Atlanta Tech. Group, 267 Ga. 801, 806 (2) (485 SE2d 22) (1996), became effective.

As far as defendants are concerned, only Bauer remains a party. The developer sought to enjoin the residents from actively opposing its efforts to rezone a parcel of property adjoining the subdivision. Providence also sought money damages on its claim that Bauer and other residents breached contractual duties and tortiously interfered with Providence's contractual relations by circulating petitions opposing rezoning, writing letters to county officials and speaking out before the Cobb County Planning Commission. After an expedited hearing held pursuant to OCGA § 9-11-11.1 (d), the court found Providence's suit to be an improper attempt to chill Bauer's free speech and petition rights and dismissed the complaint.

1. In enacting the anti-SLAPP statute, the legislature declared, "it is in the public interest to encourage participation by the citizens of Georgia in matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition government for redress of grievances. The General Assembly of Georgia further finds and declares that the valid exercise of [these] constitutional rights . . . should not be chilled through abuse of the judicial process." OCGA § 9-11.11.1(a).

To prevent such abusive litigation, the legislature imposed several procedural safeguards. Any complaint arising from an act "which could reasonably be construed as an act in furtherance of" a defendant's free speech or petition rights must be accompanied by a verification, based on belief formed after reasonable inquiry, that the suit is well grounded in fact and law or represents a good-faith argument for the extension of existing law. OCGA § 9-11-11.1(b).

The plaintiff and her counsel must also verify the act forming the basis of the suit is not a "privileged communication" under OCGA § 51-5-7, and that the suit is not filed "for any improper purpose such as to suppress a person's . . .right of free speech or right to petition government . . . ." Id. If the defendant files a motion to dismiss, the trial court must hold a hearing on the motion within 30 days of its service, if possible. OCGA § 9-11-11.1 (d).

Bauer filed a motion to dismiss on grounds that the activities of which Providence complained were privileged as "[s]tatements made in good faith as part of an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern . . . ." OCGA § 51-5-7 (4). Such statements are defined in OCGA § 9-11-11.1 (c) to include written and oral statements and petitions made to legislative or executive bodies regarding an issue being reviewed by the body. As the trial court construed the statute, opposing a rezoning application by collecting signatures for a petition, writing letters to government officials, and speaking out at an official hearing clearly fall within the category of privileged activities.

Providence defends its suit against Bauer as valid because his actions violated a restrictive covenant between residents of Cumberland Ridge and Providence which runs with the land and binds subsequent purchasers such as Bauer whose deeds reflect the[re] are

subject to the restrictive covenant. See generally OCGA §§ 44-5-60, 44-5-39. See also Rosen v. Wolff, 152 Ga. 578, 583 (110 SE 877) (1922) (discussion of covenants running with land compare with personal covenants); Lowry v. Norris Lake Shores Dev. Corp., 231 Ga. 549, 551 (203 SE2d 171) (1974) (covenant runs if it concerns the land or its use and subsequent grantee has notice).

The covenant states: "It is presently contemplated by [Providence] that portions of the overall scheme for the Development, and any and all contiguous land in which [Providence] presently has or may hereafter acquire an interest, include, in addition to a single-family residential lots, phases to be developed as apartments, townhouses, condominiums, patio homes, shopping centers (with tenants who shall be approved at the sole discretion of [Providence]), golf driving range, office, storage and light industrial. By acceptance of the deed conveying a Lot, each Owner acknowledges the foregoing plan and Covenants and agrees not to oppose any application to amend the zoning ordinances of any petition seeking a variance of the zoning laws and regulations of the appropriate political subdivisions in order to permit such land usages or the use of other property in the area for a golf course, lounge, restaurants, and recreational facilities; further, each owner agrees not to oppose any license application or transfer relating to any such permitted land usages in the Development and in any and all contiguous land in which [Providence] presently has or may hereafter acquire an interest." This restrictive covenant is unenforceable as against public policy.

"A contract cannot be said to be contrary to public policy unless the General Assembly has declared it so, or unless the consideration of the contract is contrary to good morals and contrary to law, or unless the contract is entered into for the purpose of effecting an illegal or immoral agreement or doing something which is in violation of law. [Cit.]" Porubiansky v. Emory University, 156 Ga. App. 602, 603 (275 SE2d 163) (1980), aff'd, 248 Ga. 391 (282 SE2d 903) (1981). "A contract which is against the policy of the law cannot be enforced." OCGA § 13-8-2.

In O.C.G.A. § 9-11-11.1 (a), the General Assembly specifically declared that it is the public policy of this state to encourage citizens to exercise their rights of free speech and petition, and it forbade abuse of the judicial system to discourage such activity. Providence seeks to enforce a covenant which inhibits the speech and political activities of not only the original property purchaser, but also of all subsequent lot purchasers. "Contracting parties may waive or renounce what the law ha established in their favor provided such waiver or renunciation does not thereby injure others or affect the public interest." Young v. John Deere Plow Co., 102 Ga. App. 132, 135 (115 SE2d 770) (1960). Also, the waiver of a right must be made voluntarily and with knowledge of the rights being waived. See West v. Fulton County, 267 Ga. 456, 458 (2) (479 SE2d 722) (1997).

The covenant is overly broad, as it seeks to prevent residents from opposing future unspecified attempts by the developer to seek rezoning of "any and all contiguous land" that Providence may

acquire. The covenant which is also vague, would prevent all lot purchasers in a development from exercising their constitutional rights to oppose government action which may affect their neighborhood's character and the properties' value. Such a prohibition is contrary to public policy and the public interest. See Porubiansky, supra. United Egg Producers v. Standard Brands, 44 F. 3d 940 (11th Cir. 1995), which Providence cites, is distinguishable. No governmental action was involved where a trial court ratified a settlement agreement by which each party agreed not to disparage the other. This case involves the affecting of "governmental action." Plus, the restrictions on free speech rights in United Egg Producers were narrow and specific. As the court noted, that case concerned an agreement settling a lawsuit, made between "two disputing parties in positions of equal bargaining power to restrict, in a limited degree, their First Amendment rights on commercial speech." Id. at 943.

Providence's reliance on Muldawer v. Stribling, 243 Ga. 673 (256 SE2d 357) (1979), is likewise misplace. The Supreme Court held that a subsequent purchaser of property was bound by a covenant forbidding him from seeking to rezone the property. In effect, that property was pledged for a certain use, and such covenants have been found proper and enforceable. See, e.g., Chambers v. Gallaher, 257 Ga. 795 (364 SE2d 576) (1998) (covenant prohibiting operation of business in residential subdivision upheld); Deck, Inc. v. Noe, 222 Ga. 189 (149 SE2d 68) (1996) (covenant prohibiting erection of any building other than motel upheld). Although Muldawer recites that the covenant at issue resulted from an agreement that one party would not oppose a rezoning, the enforceability of that portion of the agreement was not at issue.

Because Providence's covenant is unenforceable as against public policy, we need not determine whether it was otherwise binding on Bauer or other residents of Cumberland Ridge. A judgment right for any reason will be affirmed. See Little v. Fleet Finance, 224 Ga. App. 498, 503-504 (1) (481 SE2d 552) (1997).

2. Next, Providence contends the trial court had no authority to dismiss the complaint once Providence filed the affidavit required by O.C.G.A. § 9-11-11.1 (b). But verified or not, the face of the complaint failed to state a claim upon which relief could be granted. See Little, supra at 504 (2).

3. Providence argues that the trial court should have allowed it to amend its complaint to state a claim. Nothing in the record shows Providence ever offered any deficiency-correcting amendment. An issue raised for the first time on appeal is not considered. See Merrill v. First Union & c. of Georgia, 224 Ga. App. 773 (1) (481 SE2d 890) (1997).

Judgement affirmed. Senior Appellate Judge Harold R. Banke concurs. McMurray, P. J., concurs in Division 1 and Division 3 and in the judgment.

SUPREME COURT OF GEORGIA

CASE NO. S98C0567 ATLANTA, MAY 22, 1998

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

PROVIDENCE CONSTRUCTION COMPANY v. DAVE BAUER

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk.